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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 225

IN THE MATTER OF MORTON DAVID BLUESTONE,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

MORTON DAVID BLUESTONE,
Pro Se.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Questions presented	6
Reasons relied upon for the allowance of the writ	8
Prayer for writ	9
Statement as to jurisdiction	10
Brief in support of petition	13
Opinions in courts below	13
Grounds on which jurisdiction of the Supreme Court of the United States is invoked	14
Statement of case material to questions presented	15
Errors assigned	17
Argument	17
Conclusion	22

Table of Cases Cited.

Cantwell v. *State of Connecticut*, — U. S. —, 60 Sup. Ct. 900	11, 18
DeJonge v. *Oregon*, 299 U. S. 353	10, 18, 21
Gitlow v. *New York*, 268 U. S. 652	10, 18
Grosjean v. *American Press Co.*, 297 U. S. 233	10, 18
Herndon v. *Lowry*, 301 U. S. 242	10, 18
Lovell v. *Griffin*, 303 U. S. 444	11, 18
Palko v. *Connecticut*, 302 U. S. 319	10, 18
Schenck v. *United States*, 249 U. S. 47	18
Schneider v. *State of New Jersey*, 308 U. S. 147	11, 18

Laws, Statutes, etc.

Act of April 14, 1834 (Pennsylvania), P. L. 333, Sec. 69	19
Judicial Code, Sec. 237 as amended	6, 10, 14
United States Constitution, Article VI	20
United States Constitution, Fourteenth Amendment,	7, 10, 11, 18, 22

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IN THE MATTER OF MORTON DAVID BLUESTONE,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved.

The principal facts in petitioner's case (which can be found stated in greater detail in his petition to the Supreme Court of Pennsylvania forming a part of the attached certified transcript of record in this case) are as follows:

Morton David Bluestone, the above-named petitioner, having applied on April 28, 1938, to the Pennsylvania Board of Law Examiners for registration as a law student in Allegheny County, Pennsylvania, was referred to the Allegheny County Board of Law Examiners for completion of such registration. On September 1, 1938, petitioner was interviewed by a committee of two members of the Allegheny County Board of Law Examiners for this purpose; and,

inter alia, petitioner was asked, "Do you believe in the [United States] Constitution?" Petitioner replied, "No." Petitioner was then asked whether or not he would take an oath to support the Constitution, and he answered in the affirmative, stating that he had already taken such an oath, without mental reservation, at the time he entered his employment with the United States Government. (Petitioner was, at that time, and still is, in the employ of the United States Department of the Interior, Bureau of Mines, Pittsburgh, Pa., having obtained such employment through examination and certification by the United States Civil Service Commission.)

After lapse of several months and numerous inquiries by petitioner of the Allegheny County Board of Law Examiners concerning the status of his application for registration, petitioner was requested to appear at a meeting of the Board held April 6, 1939. Petitioner so appeared and was questioned by various members of the Board. The questions centered around three principal subjects, namely:

1. Petitioner's activity in "voluntary associations" during the period of his undergraduate studies at the University of Pittsburgh; and whether or not such organizations were Communistic.

2. Reconciliation of petitioner's non-"belief" in the Constitution with his ability to take an oath to support it.

3. Reasons for petitioner's non-"belief" in the United States Constitution, such as his opinions of what constituted the Constitution's inadequacies, and his opinions concerning desired changes in the governmental structure of the United States.

Petitioner answered questions of the first type as fully as his recollection permitted, and raised objection to none of them, although during the course of questioning, and in

a letter to the Board, and at a later appearance before the Board, he stated his opinion that such questions were legally irrelevant.

Petitioner answered questions of the second type by summarizing a statement he had made to the Board's committee when he was interviewed on September 1, 1938. The statement, of which the Board was already informed through a transcript of stenographic notes taken at the September 1, 1938, interview, was substantially that petitioner thought himself capable of taking an oath to support the Constitution on the same basis as elected legislators who were committed to a program which included amendment of the Constitution by use of the amending process prescribed therein.

Concerning questions of the third type, petitioner explained that by his negative answer to the question "Do you believe in the Constitution?" he meant that he did not consider the Constitution an adequate instrument of government at the present time. Petitioner refused to answer, when originally asked, such questions as "What in your opinion is wrong with the Constitution?" stating that he thought such questions were of a political nature and that his political opinions were outside of the County Board's scope of authority in an inquiry by the Board into his character and reputation as an applicant for registration as a law student. The presiding officer of the Board, however, made no decision, either affirmative or negative, on petitioner's objection, and made no effort to interpose against such questions when they were repeatedly put, and petitioner answered (in as general and non-political manner as he could conceive under the circumstances) numerous questions concerning his opinions on the United States Government and Constitution, what petitioner considered their inadequacies, and what changes in them petitioner would favor.

No decision concerning petitioner's application was made at the April 6, 1939, hearing; and after several attempts by petitioner to obtain a definite decision, he finally requested and obtained the Board's permission to appear at the Board's November 9, 1939, meeting and make a statement he thought would aid the Board in rendering a decision upon his application. Petitioner read to the Board a 1937 decision of the Supreme Court of Pennsylvania (333 Pa. 593), in which that court stated that a county board of law examiners would not be required to divulge its reasons for refusing to register a law student. Petitioner pointed out that this decision permitted the Board to decide upon his application without further delay; however, he went on to state that the opinion of the Pennsylvania Supreme Court said in effect that county boards were not bound by the Fourteenth Amendment of the United States Constitution to grant due process to those appearing before such boards. Petitioner contended that such a premise was incorrect.

Petitioner went on, at this meeting, to review what appeared to be the questions at issue concerning his application; to summarize his objections to the Board's method of procedure at the April 6, 1939, hearing; and to point out certain remarks made by Board members at that hearing which would tend to mislead anyone reading the record of the proceedings. Petitioner also reiterated his willingness to answer any relevant questions the Board might wish to ask, within the scope of its authority; but no questions were raised.

On November 10, 1939, the Secretary of the Allegheny County Board of Law Examiners informed petitioner by letter that the Board had rejected his application for registration as a law student and had forwarded a negative recommendation to the State Board of Law Examiners. No reasons for the rejection and negative recommendation

were then, nor have they since been, given or communicated to petitioner. On November 15, 1939, petitioner wrote to the State Board of Law Examiners requesting a review of the Allegheny County Board's decision; this in accordance with Rule 9 of the Pennsylvania Supreme Court having reference to the admission to the bar. Copies of all correspondence, testimony, etc., relevant to petitioner's application and in his possession, were forwarded to the State Board on November 24, 1939.

Petitioner was advised by letter dated December 8, 1939, from the Secretary of the State Board of Law Examiners that the State Board had, at its meeting of December 7, 1939, affirmed the action of the Allegheny County Board in refusing to recommend petitioner for registration as a law student. No reasons for the State Board's decision were, nor have they since been, communicated to petitioner.

Petitioner, on December 9, 1939, advised the State Board by letter of his intention to appeal from its decision to the Pennsylvania Supreme Court; and in view of no outline of procedure appearing in that court's rules which provide for such an appeal, and the fact that State Board rulings require such an appeal to be filed in duplicate with the Board, petitioner asked, in his letter, for necessary instructions for properly appealing the Board's decision. On December 11, 1939, the Secretary of the State Board replied by letter to petitioner stating that the petition should set forth "(1) the reasons for granting your appeal, and (2) praying that the Court will allow the same." No other requirements were indicated; and petitioner mentions these facts solely for the purpose of explaining why, when on December 25, 1939, he forwarded his petition (certified copy of which is annexed hereto as part of the record) in duplicate to the State Board to be filed with the Prothonotary of the Pennsylvania Supreme Court, no transcript of

the proceedings of the Allegheny County Board, or other record, in the matter of petitioner's application for registration as a law student, accompanied said petition. Petitioner is ready to furnish any and all relevant parts of the actual record of his case in his possession.

After receiving an acknowledgment of receipt by the State Board of the copies of his petition, petitioner heard nothing further until he received from the Prothonotary of the Eastern District of the Supreme Court of Pennsylvania a letter quoting the order of that court dated April 9, 1940 (a certified copy of which is annexed hereto as part of the record), dismissing petitioner's appeal. Petitioner's contentions as to grounds for setting aside the decisions of the County and State Boards (see R. 5-6) were not discussed in any way by the Supreme Court of Pennsylvania in its dismissal of the petition.

This is a petition for writ of certiorari to review the decree of the Supreme Court of Pennsylvania (Sec. 237, Judicial Code, as amended; Sec. 8(a), Act of February 13, 1925, 43 Stat. 937,940).

Questions Presented.

The four following questions to which petitioner seeks an answer, and which he sought to have answered by raising the four contentions above mentioned (R. 5-6) in his petition to the Supreme Court of Pennsylvania, have been raised in the proceedings below, but not answered. Since at no time were reasons given by the Allegheny County or State Board of Law Examiners for the refusal to register petitioner, he is uncertain as to which, if any, of the reasons indicated in the first three questions were the grounds for the refusal relied upon by the Allegheny County Board. Since, however, the points involved were subjects upon which petitioner was questioned at length by said County Board, and since presentation of the fourth question alone

would in all probability result in the necessity of later resorting further to judicial channels to settle issues already apparent on the face of the record and disposable of at this time, petitioner presents as questions the following:

1. May a county or state board of law examiners, without violating the due process clause of the Fourteenth Amendment of the United States Constitution, refuse to register an otherwise-qualified applicant for the study of law for the reason that he has expressed a disbelief in the current adequacy of that Constitution as an instrument of government?

2. May such a board, without violating the aforesaid due process clause, refuse such registration on the ground that the applicant therefor is not capable of taking, conscientiously, in good faith, and without mental reservation, the lawyer's oath to support the Constitution, particularly when

(a) Such board has not challenged as a fact the applicant's previous taking of an oath to support the Constitution when he entered upon employment with the federal government; and when

(b) Such board has neither alleged nor shown that the applicant ever violated the oath to support the Constitution which said board has acknowledged he took.

3. May such a board, without violating aforesaid due process clause, refuse such registration for the reason that the applicant therefor was once a member of an organization of which, at the time of applicant's membership, a minority of members were Communists, particularly when it does not appear either

(a) That the organization was either Communist-controlled or engaged in illegal activities; or

(b) That the applicant himself was or is a Communist or ever engaged in any illegal activities, either as an individual or as a member of such organization.

4. Can such a board, under authority of a state supreme court decision, fail to disclose to an applicant its reasons for refusing him registration, without violating aforesaid due process clause?

Reasons Relied Upon for the Allowance of the Writ.

The questions presented in this case are substantially (a) whether a quasi-judicial state administrative agency may exclude persons from practice of a profession or occupation because such persons hold unusual or even unpopular political opinions which are not illegal; and (b) whether such an agency is required to disclose reasons for such exclusions. The increasing degree of governmental regulation of occupations and professions renders increasingly important the need for clearer demarcation of the extent of regulatory powers of such agencies, in order that personal rights of liberty of thought, conscience, and expression may be adequately protected and the exercise of governmental authority be guided by law rather than personal prejudice, by reason instead of arbitrary form. The questions are also of pressing personal importance to the petitioner: he is expending his efforts toward completion of his law studies by June, 1942; unless these questions are decided favorably to petitioner before that time, he will not be granted admission to the examinations for admission to the bar in his State.

The questions here presented have not heretofore been passed upon by this Court; but while the first three may involve relatively new legal points, it is submitted that the ruling of the Supreme Court of Pennsylvania, in dismissing petitioner's appeal to that court and in effect denying

the responsibility of the County Board of Law Examiners to divulge reasons for its decisions, is so flagrant a failure to require that board to grant due process of law that no American governmental agency or court has ever suggested such procedure to be constitutional.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the Supreme Court of Pennsylvania; that the order of that court be reversed; and that your petitioner have such other and further relief as to this honorable Court may see meet and just.

MORTON DAVID BLUESTONE,
Petitioner.

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States upon certiorari is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, ch. 229, sections 1 and 8(a) (43 Stat. 937, 940; United States Code, Annotated, Title 28, sections 344, 350). The final decree of the Supreme Court of Pennsylvania was entered April 9, 1940. Application for certiorari is herewith presented on the first day of July, 1940.

The validity of a statute or ordinance is not here raised. The questions presented are, in substance, whether the decision of a county board of law examiners refusing to register a law student violates the "due process" clause of the Fourteenth Amendment of the United States Constitution where such decision is apparently based upon (1) the board's disapproval of political opinions which it was noted denied the applicant for registration was legally entitled to hold and which he expressed in direct answer to inquiries made by the board, or (2) reasons which the board has not disclosed to the applicant and thus not afforded him an opportunity to disprove.

It has been contended by petitioner, in the manner and at the stages of the proceedings indicated below, that the first ground of refusal violates said "due process" clause by arbitrarily excluding petitioner from possible future practice of law merely because he exercised his liberty or freedom of speech in an undoubtedly legal manner. It is well-settled by this Court that the protection of the "due process" clause is afforded to freedom of speech and thought; and the following cases are believed to sustain the jurisdiction of the Supreme Court of the United States in this case: *Gitlow* v. *New York*, 268 U. S. 652 (666); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (244); *DeJonge* v. *Oregon*, 299 U. S. 353 (364); *Herndon* v. *Lowry*, 301 U. S. 242 (259); *Palko* v. *Connecticut*, 302 U. S. 319 (324); *Lovell*

v. *Griffin*, 303 U. S. 444; *Schneider* v. *State of New Jersey*, 308 U. S. 147; and *Cantwell* v. *State of Connecticut*, — U. S. —, 60 S. Ct. 900.

It has further been contended by petitioner, as indicated below, that the failure of the county board in the instant case to disclose reasons for its refusal to register petitioner as a law student, and the refusal of the Supreme Court of Pennsylvania to compel any county board to disclose such reasons in similar cases (see last paragraph, page 3 of attached record, citing 333 Pa. 593) are denials of due process within the meaning of the Fourteenth Amendment in failing to give petitioner opportunity to protect himself against arbitrary, unreasonable, or legally groundless exercise of authority by the county board of law examiners.

The four questions presented to this Court on pages 6 to 8 of this petition were raised by petitioner in the Supreme Court of Pennsylvania under the following circumstances:

Petitioner, a citizen of the United States and of the State of Pennsylvania, and a resident of Allegheny County of said state, had filed application for registration as a law student with the Allegheny County Board of Law Examiners and the Board of Law Examiners of the State of Pennsylvania, said boards being the agencies delegated by the Supreme Court of Pennsylvania to administer its rules relating to the admission to the bar in said State and county. Petitioner was refused registration by the Allegheny County Board on November 9, 1939; and in accordance with said rules of the Pennsylvania Supreme Court, petitioner appealed to the State Board of Law Examiners for a review of the County Board's decision. On December 8, 1939, the State Board affirmed the County Board's decision. Neither Board disclosed to petitioner the reasons for its decision; and in view of a controlling decision of the Pennsylvania Supreme Court (333 Pa. 593, 594) stating that such boards

were not required to divulge reasons for their decisions, petitioner did not specifically request either Board to disclose its reasons. Petitioner had, however, at hearings on his application held by the County Board and in correspondence with the County Board, objected to the Board's extensive questioning of him concerning his political opinions, on the ground that the County Board could not render a valid decision based on its disapproval of political opinions petitioner was legally entitled to maintain (R. 2-3). When petitioner, in accordance with Pennsylvania Supreme Court rules and the regulations of the State Board of Law Examiners, forwarded to the State Board a petition addressed to the Supreme Court of Pennsylvania appealing from the decisions of the County and State Boards, he therefore incorporated these objections in his petition to the Pennsylvania Supreme Court (R. 5-6, points 1 to 4). The petition was filed by the State Board on March 29, 1940. The decree of the Supreme Court of Pennsylvania, dated April 9, 1940, dismissing the petition is quoted verbatim herewith:

> We have reviewed this record and are convinced that under the facts the applicant was properly denied the privilege of registering as a student of law. Petition dismissed. April 9, 1940. Per Curiam.

The writ of certiorari prayed for in this Court is to review the foregoing decree of the Supreme Court of Pennsylvania. Jurisdiction is invoked under the statutory provisions listed in the first paragraph of this statement, and cases believed to sustain the jurisdiction of the Supreme Court of the United States are set forth in the second paragraph of this statement.

Respectfully submitted,

MORTON DAVID BLUESTONE,
Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 225

IN RE APPLICATION OF MORTON DAVID BLUESTONE FOR REGISTRATION AS A LAW STUDENT.

BRIEF.

Opinions in Courts Below.

The court decision sought to be reviewed was rendered in the Supreme Court of Pennsylvania on April 9, 1940. The case is unreported, but is indexed in the files of the above Court as No. 289, Misc. Docket #7, In re Application of Morton David Bluestone for registration as a law student. The court's decision is so brief it is quoted herewith:

> We have reviewed this record and are convinced that under the facts the applicant was properly denied the privilege of registering as a student of law. Petition dismissed. April 9, 1940. Per Curiam.

The decision affirmed those of the Allegheny County Board of Law Examiners and the Board of Law Examiners of the Commonwealth of Pennsylvania, refusing to register the above-named applicant as a law student in Allegheny County. Jurisdiction of the Supreme Court of the United

States to review the above decision upon certiorari to the Supreme Court of Pennsylvania is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, ch. 229, Sections 1 and 8a (43 Stat. 937, 940; United States Code, Annotated, Title 28, Sections 344, 350).

Grounds on Which Jurisdiction of the Supreme Court of the United States is Invoked.

The questions involved in the refusal of the above Boards of Law Examiners to register petitioner as a law student in Allegheny County, Pennsylvania, and presented to this Court in the attached petition for certiorari, disclose the grounds upon which the jurisdiction of this Court is invoked. They are as follows:

1. May a county or State board of law examiners, without violating the due process clause of the Fourteenth Amendment of the United States Constitution, refuse to register an otherwise-qualified applicant for the study of law for the reason that he has expressed a disbelief in the current adequacy of that Constitution as an instrument of government?

2. May such a board, without violating the aforesaid due process clause, refuse such registration on the ground that the applicant therefor is not capable of taking, conscientiously, in good faith, and without mental reservation, the lawyer's oath to support the Constitution, particularly when

(a) Such board has not challenged as a fact the applicant's previous taking of an oath to support the Constitution when he entered upon employment with the Federal Government; and when

(b) Such board has neither alleged nor shown that the applicant ever violated the oath to support the Constitution which said board has acknowledged he took.

3. May such a board, without violating aforesaid due process clause, refuse such registration for the reason that the applicant therefor was once a member of an organization of which, at the time of applicant's membership, a minority of members were Communists, particularly when it does not appear either

(a) That the organization was either Communist-controlled or engaged in illegal activities; or

(b) That the applicant himself was or is a Communist or ever engaged in any illegal activities, either as an individual or as a member of such organization.

4. Can such a board, under authority of a State Supreme Court decision, fail to disclose to an applicant its reasons for refusing him registration, without violating aforesaid due process clause?

Statement of Case Material to Questions Presented.

Petitioner, during an interview with a committee of the Allegheny County Board of Law Examiners delegated by the Board to act upon his application for registration as a law student, replied negatively to the question, "Do you believe in the [United States] Constitution?" The committee then asked petitioner whether he could conscientiously and without mental reservation take an oath to support the Constitution and petitioner replied that he could and that he had already done so upon entering the civil service of the United States Government (R. 1).

Petitioner's application was eventually referred to the Allegheny County Board of Law Examiners *en banc*, and petitioner was further questioned upon these points. He was asked how he could take such an oath conscientiously, in view of his stated opinion that the United States Constitution was currently an inadequate instrument of govern-

ment; and he replied that he could do so on the same basis as an elected legislator who had committed himself to a program requiring amendment of the Constitution by use of the amending procedure providing for therein. Petitioner was also questioned concerning his activities in "voluntary associations" while he was a student at the University of Pittsburgh, and whether any such organizations were Communistic in nature (R. 2). Petitioner answered these questions by disclosing that he had been a member of the American Student Union some years before, at a time when it was not controlled by any one political group and only a minority of its members were Communists.

When petitioner's application for registration as a law student was ultimately rejected by the Allegheny County Board, no reasons were disclosed to him for the rejection. The same was true when the State Board of Law Examiners affirmed the decision of the County Board, on petitioner's appeal. Petitioner made no request to either Board to disclose its reasons when he was notified of either decision; he regarded such request as futile and unnecessary in view of a decision of the Supreme Court of Pennsylvania, In re ——, 333 Pa. 593, stating that such boards were not required to divulge reasons for their decisions in such cases.

All contentions thus raised by petitioner were thereby left unanswered by both County and State Boards. When petitioner appealed to the Supreme Court of Pennsylvania, he contended:

(1) That the rejection of his application, if made on the ground of his non-"belief" in the adequacy of the United States Constitution, was invalid in the light of the Fourteenth Amendment to that Constitution.

(2) That any doubt the County Board may have had of petitioner's ability to take an oath to support the Constitution was unfounded in both fact and theory.

(3) That any possible connection between the County Board's rejection of petitioner's application and the Board's inquiries as to possible Communistic tendencies of organizations of which petitioner had been a member was irrelevant, because it was never shown that petitioner was himself a Communist or that the organizations were Communist-controlled, much less that either petitioner or said organizations ever engaged in any illegal activity.

(4) That petitioner had never been notified of any other reasons, if any, for his rejection, and had been given no opportunity to disprove their validity.

Errors Assigned.

The April 9, 1940, decision of the Supreme Court of Pensylvania, quoted in full on page 13 of this brief, dismissed petitioner's appeal without answering any of the contentions he presented. That Court's failure to pass upon the contentions presented is assigned as separate error as to each contention. Petitioner now urges these contentions, formulated as the questions presented this Court, and appearing on pages 14-15 of this brief, and presents the following argument in support of a negative answer to each of them.

ARGUMENT.

1. Petitioner's answers and stated opinion concerning the Constitution were in legal exercise of his freedom of speech; and the Board's refusal to register him for any reason connected therewith was an infringement upon such freedom so as to deny petitioner the due process of law required by the Fourteenth Amendment.

It cannot be questioned that petitioner was legally entitled to hold the views he expressed, for the right to entertain particular political beliefs has never been legally con-

tested in this country. The question in this regard, therefore, is whether there was anything legally objectionable in petitioner's exercise of his right of expression of such views. Petitioner submits that there obviously was not any such legal objection: he was answering questions asked him by a governmental agency, and doing so in an orderly and peaceful manner, and was not even attempting to persuade anyone in his presence to his political views. Petitioner's method of expression was, therefore, well within the bounds of legality according to the tests applied by this Court in a long line of cases, beginning with *Schenck* v. *United States,* 249 U. S. 47, and continuing to *Herndon* v. *Lowry,* 301 U. S. 242.

Petitioner's exercise of free speech having been lawful, it is well settled that the Fourteenth Amendment can be invoked to protect it. *Gitlow* v. *New York,* 268 U. S. 652 (666); *Grosjean* v. *American Press Co.,* 297 U. S. 233 (244); *DeJonge* v. *Oregon,* 299 U. S. 353 (364); *Herndon* v. *Lowry,* 301 U. S. 342 (259); *Palko* v. *Connecticut,* 302 U. S. 319 (324); *Lovell v. Griffin,* 303 U. S. 444; *Schneider* v. *State of New Jersey,* 308 U. S. 147; and *Cantwell* v. *State of Connecticut,* — U. S. —, 60 S. Ct. 900. While most of these cases involve either criminal legislation or prohibiting ordinances affecting the exercise of free speech, these are not the only methods of repressing free speech that are repugnant to the Fourteenth Amendment. In *Grosjean* v. *American Press Co.,* 297 U. S. 233, this Court held unconstitutional a State tax on newspaper circulation on the ground that it abridged the freedom of the press in a manner repugnant to the due process clause of the Fourteenth Amendment. The tax in question, imposed upon the gross receipts of newspapers having a circulation of more than 20,000 weekly, had as its object restriction of circulation of certain newspapers which were recognized as being opposed to the politi-

cal organization whose members were elected State officials. Petitioner contends that his case is analogous in essential respects to the *American Press Co.* case. The refusal of the Allegheny County Board of Law Examiners to register petitioner as a law student because he held or expressed particular political views, has the effect of abridging petitioner's freedom of speech. It would have been no answer to the newspapers in the *American Press Co.* case to have told them that their right of freedom of expression was still exercisable by them if they kept their circulation below 20,000 copies per week. Similarly, it would be no answer to petitioner to tell him that his freedom of speech is unimpaired, if he is to be excluded from the practice of law because he exercised it in a lawful manner. For an examining board to exclude an applicant from a profession because that board disapproves of or disagrees with the applicant's lawfully-held and lawfully-exercised political opinions must, petitioner contends, be repugnant to the due process of law clause of the Fourteenth Amendment.

2. The contention that petitioner is legally incapable of taking the lawyer's oath because of his views concerning the Constitution is not well founded, particularly in view of the acknowledged facts in the case.

The lawyer's oath in question is that provided for as follows by act of the Pennsylvania legislature, April 14, 1834, P. L. 333, sec. 69:

> Before any attorney, admitted as aforesaid, shall make any plea at the bar except in his own case, he shall take an oath or affirmation, as follows, viz.:
>
> You do swear or affirm that you will support the Constitution of the United States and the Constitution of this Commonwealth, and that you will behave yourself in the office of attorney, within this court to the

> best of your knowledge and ability, and with all good fidelity, as well to the court as to the client, that you will use no falsehood, nor delay any person's cause for lucre or malice.

No case in point has aver arisen involving this or similar oaths; but neither an inspection of the phrasing of the oath nor logical reasoning sustains a conclusion that belief in the current adequacy of the Constitution is a prerequisite to taking such an oath. On the contrary, both history and reason support an opposite conclusion; for members of Congress are required to take such an oath (i.e., to support the Constitution; Article VI, clause 3, of the Constitution itself) and yet they are specifically authorized by the Constitution itself to propose amendments to the Constitution; and Congress has done this on numerous occasions. Certainly a proposal to amend the Constitution is nothing less than a proposal to remedy an inadequacy in it; and no one would seriously suggest that, when the Congress of the United States proposes a constitutional amendment, the members thereof are violating their oaths. Were such a suggestion to be law the Constitution could never be changed and its Article VI would become meaningless; for persons elected to Congress and known to be intending to propose amendments to the Constitution would be automatically disqualified from taking the oath required of them and also from taking their seats.

The contention, put forward by members of the Allegheny County Board of Law Examiners, that petitioner is legally unqualified to take an oath to support the Constitution is rendered further groundless by the facts (a) that the Board has never challenged as a fact petitioner's statement in testimony that he had taken such an oath, and (b) that the Board has never contended that petitioner violated the oath he did take (R. 2, 5-6).

3. Any reasons for refusal to register petitioner because of his previous membership in organizations in which there were Communist members cannot be view as valid.

Although no case in exact point appears in the reports of this Court, a reasonably close analogy is found in *DeJonge* v. *Oregon,* 299 U. S. 353, in which a criminal syndicalism statute was held unconstitutional because it was so broad that anyone assisting in the conduct of a meeting, however peaceable and lawful its purpose, would be classed as a criminal if the meeting were held by an organization of the type outlawed by the statute. The principal in the *DeJonge* case was a Communist, assisted at such a meeting, and along with others was indicted under the statute. This Court held that his conviction could not stand on the facts shown because the statute was repugnant to the due process clause of the Fourteeenth Amendment.

This case, though on the civil side, presents facts in petitioner's favor stronger than were those for the appellant in the *DeJonge* case, for the Allegheny County Board of Law Examiners not only failed to show that petitioner ever participated in any illegal activities or assisted organizations of illegal purpose or activity, but failed also to show even that petitioner was a Communist, or that any of the organizations to which he belonged was Communist-controlled. Petitioner therefore contends that the Board's rejection of his application, if based on any of these suggested grounds, was repugnant to the due process of law clause of the Fourteenth Amendment if he has established in argument 1 any right protectable by this clause.

4. Any reliance by the County Board upon an alleged right to refuse to divulge reasons for its rejection of petitioner's application is necessarily repugnant to the due process clause of the Fourteenth Amendment.

No cases on this point have been before this Court; however, it is a well established principle that exercise of

administrative authority, whether quasi-judicial or not, must be reasonable and not arbitrary. To permit the principle expressed in 333 Pa. 593 to stand as law is to authorize county boards of law examiners to refuse registrations on any ground or on no ground at all and to effectively deny applicants for such registration any right of appeal if they are refused. It would be, in short, giving such boards plenary powers to exercise any arbitrary inclinations their members might possess; and such unchecked and arbitrary authority is utterly inconsistent with the concept of orderly and reasonable judicial procedure embodied in the due process clause of the Fourteenth Amendment.

Conclusion.

The judgment of the Supreme Court of Pennsylvania should be reversed and the petitioner's application for registration as a law student reinstated.

MORTON DAVID BLUESTONE,
Petitioner.

Office - Supreme Court, U. S.
FILED
SEP 26 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 225 October Term, 1940

In the matter of

MORTON DAVID BLUESTONE,

Petitioner.

Brief in Opposition to Petition for Writ of Certiorari

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SUBJECT INDEX

Page

HISTORY OF ADMISSION TO THE BAR IN PENNSYLVANIA 1

LEGAL OBJECTIONS TO THE PETITION 7

ARGUMENT 8

1. Due Process Clause Inapplicable 8
2. Due Process Afforded 11
3. Record Insufficient to Establish That Applicant Was Rejected for the Reasons He Asserts 12

APPENDIX "A"

Circular of Information, State Board of Law Examiners, Commonwealth of Pennsylvania (containing the rules and regulations for admission to the bar) 13

TABLE OF CITATIONS

Cases

Page

Bergeron, Petitioner, 220 Mass. 472 10
Bradwell v. The State, 16 Wall. 130 8
Case of Austin and others, 5 Rawle (Pa.) 191 9
Cohen v. Wright, 22 Cal. 293 10
Ex parte Garland, 4 Wall. 333 ..... 9, 10
Ex parte Secombe, 19 How. 9 ..... 9, 10
Ex parte Wall, 107 U. S. 265 11
In re Lockwood, Petitioner, 154 U. S. 116 8
In re O'Brien's Petition, 79 Conn. 46, 63 Atl. 777 ..... 9, 10
In re Samuel Davies, 93 Pa. 116 ..... 9, 10
Keeley v. Evans et al., 271 Fed. 520, appeal dismissed 257 U. S. 667 .. 8
Local Government Board v. Arlidge [1915] A. C. 120 11
Matter of Ole Mosness, 39 Wis. 509 10
McGrath v. Nolan, 83 F.(2d) 746 (C. C. A. 9th, 1936) 12
Mitchell v. Greenough et al., 100 F.(2d) 184, certiorari denied 306 U. S. 659 9
Montgomery County Bar Ass'n. v. Rinalducci, 329 Pa. 296 10
Murray's Lessee et al. v. Hoboken Land & Improvement Co., 18 How. 272 12
Olmsted's Case, 292 Pa. 96 9

Note in 10 L. R. A. (N. S.) 289 10

Statutes

1 Smith Laws 145 (Pa., 1722) 1
Act of April 14, 1834, P. L. 341, 345 (Pa.) 2
Statute 4 Henry IV, chap. 18 9

IN THE

Supreme Court of the United States

No. 225. OCTOBER TERM, 1940

IN THE MATTER OF

MORTON DAVID BLUESTONE,

Petitioner.

Brief in Opposition to Petition for Writ of Certiorari

The Supreme Court of Pennsylvania, by its counsel John W. Kephart and Robert T. McCracken, answers appellant's Petition for Writ of Certiorari and files its brief on the jurisdictional and legal questions involved, as follows:

HISTORY OF ADMISSION TO THE BAR IN PENNSYLVANIA

In 1722, following in part the practice of the English courts, an Act of Assembly was passed in the Province of Pennsylvania which provided:

> "That there may be a competent number of persons of an honest disposition, and learned in the law, admitted by the Justices of the said respective courts, to practice as attorneys there, who shall behave themselves justly and faithfully in their practice . . ." (1 Smith Laws 145).

Admission was further treated by the legislature in a later act recognizing that:

> "The judges of the several courts of record of this Commonwealth shall respectively have power to admit a competent number of persons of an honest disposition [etc.]". (Act of April 14, 1834, P. L. 341, 354).

Under these and sundry other acts, as well as the inherent common law power of the courts, the courts of this Commonwealth have always exercised exclusive jurisdiction over the office of attorney-at-law, including the admission of properly qualified and well disposed persons of character and ability to fill that office. Prior to the year 1903, there was no uniform method of admission to the bar throughout the state. In a great many counties of the Commonwealth, examining boards were appointed by the courts of common pleas to examine candidates for the bar as to their educational qualifications, reputation, character, disposition and fitness to register as law students and pursue the course of study duly prescribed in the county. Thereafter the applicant was again required to submit to an examination, at that time to determine his knowledge of the law, and an investigation was again conducted to determine his reputation, character, disposition and fitness to fill the office of attorney-at-law.

At no time from 1722 to 1903 did the Supreme Court of Pennsylvania assume any control over the office of attorney or those who desired to register for the study of law in the various counties of the Commonwealth. The decisions of the several courts of common pleas of the several counties were treated as conclusive on this court, except in proceedings to protect the right to practice acquired by the incumbent attorney or to protect the public and the bar when that right was abused. Attorneys were admitted to the Supreme

Court on motion, generally after two years' practice in the county courts.

In 1903, pursuant to a memorial presented by the Pennsylvania State Bar Association to the Supreme Court, this Court, acting under its inherent power and the Constitution of Pennsylvania, created the State Board of Law Examiners, appointed the members thereof, and adopted rules governing admission to the bar of the Court, prescribing uniform examinations and satisfactory proof as to character. The duties of this Board have been to enforce the Supreme Court's rules and adopt regulations governing registration of law students, study of law and admission to the bar of the Supreme Court. (The applicable rules of the Supreme Court and regulations of the State Board are filed herewith as "Appendix 'A' ".) However, this did not preclude the courts of common pleas from continuing their practice of admission to the local bar. Although a certificate from the State Board of Law Examiners was conclusive on the question of the applicant's knowledge of the law, the admission in the courts of the several counties of the state of persons passing the State Board examinations has remained subject to the orders of the courts of common pleas and the recommendations of the local boards set up by the local courts. Notwithstanding the general practice throughout the state that a prerequisite for admission to the local bar is the passing of an examination conducted by the State Board of Law Examiners and admission to the Supreme Court, each local court still retains the power to admit any applicant to practice law before it.

Persons desiring to practice law before the Supreme Court of Pennsylvania, except lawyers from other states, are now required to register as law students with the State Board of Law Examiners. The rules of the Supreme Court

as to such registration require a degree from an approved college, or the passing of an examination on pre-legal studies. Rule 10 provides (See Appendix "A", page 9) :

> "No certificate of registration as a law student shall be issued by the state board until it is satisfied as to the applicant's fitness and general qualifications. . . . ."

It is specifically provided by Rule 9 (See Appendix "A", page 8) that:

> "where the county board certifies to the state board that an applicant does not possess the necessary fitness or general qualifications (other than scholastic), the state board, in its discretion, may hold a hearing, by a committee or otherwise; to which the applicant, one or more representatives of the county board, and, if the state board deem it proper, others shall be invited to attend, so that the state board, before passing on the question whether it shall approve or disapprove the findings of the county board, may interview the applicant personally and hold such other investigation as to it may seem proper. If the state board approves the findings of the county board and the applicant appeals to this court, and if such appeal is allowed by this court, it may either decide the matter on the record or hear, by committee or otherwise, the applicant and members of the local and state boards, or any of them, as the court may deem best."

In the case before your Honorable Court the appellant filed his application for registration as a law student, accompanied by the necessary questionnaires, with the Secretary of the State Board. This was referred to the secretary of the board of Allegheny County. The local board conducted its examination in accordance with the procedure provided by the State Board in conformity with the rules

of the Supreme Court. Two of its members personally interviewed the appellant, made a full investigation "of his fitness and general qualifications (other than scholastic)", and rendered a report and recommendation to the county board. After the hearing before these two members, the entire county board conducted a hearing, at which testimony was taken. The applicant was accorded every opportunity to show his fitness to become a member of the bar, and, after a full hearing of the case, the county board rejected the applicant's petition to register as a law student. This report was forwarded to the State Board of Law Examiners which in turn, after a full review of the record, affirmed the decision of the county board and declined to register the applicant.

The applicant then petitioned the Supreme Court to allow an appeal, and this Court, as stated in the order, after a full examination of the record including the facts, found that there was sufficient evidence to warrant the county board in rejecting his application for registration and made the order herein complained of.

The procedure in all cases of registration, as well as admission to the bar, requires the application to be filed with the State Board, which refers it to the county board for action. The county board certifies its action to the State Board, and there the complete record is lodged, including the testimony that is taken, all questionnaires and answers, all correspondence and statements in relation to the particular application, and the results of all independent investigations made by the county board and the State Board. This record, while not in the possession of the Prothonotary, is nevertheless a part of the records of the Supreme Court in that the State Board of Law Examiners is an arm of the Court and its records are always available to the judges of that Court.

In all appeals that come to the Supreme Court from the rejection of an application for registration or admission, this record is laid before the Court for its consideration. It is the record referred to in the Supreme Court's Rule 9. The only part of the record that is lodged in the Prothonotary's Office of the Supreme Court is the petition of the applicant for appeal and the order of the Court made thereon.

Pursuant to the above procedural requirements, the present applicant was accorded a full hearing before the county board. A careful investigation was made to determine his fitness. The county board rejected his application. The testimony and all letters and matters in connection therewith in the possession of the local board were submitted to the State Board, which, after careful consideration, sustained the action of the county board. The entire record of the action of the State Board and the county board was reviewed by the members of the Supreme Court, who sustained the conclusion that the applicant is unworthy to become a member of the bar.

LEGAL OBJECTIONS TO THE PETITION

1. The Supreme Court of Pennsylvania takes the position that, historically and basically, admission to practice law in the State of Pennsylvania is solely within the jurisdiction of the courts of that state. This includes not only the actual admission but the registration of persons desiring to study law with the several official boards of the state. A citizen of this state or of the United States has no inherent or constitutional right to practice law or to register with the boards of this state for that purpose. The appellant in this case was not denied due process in the refusal to register him, as he had no property right to registration.

2. The proceedings before the several boards afforded all the process that the state has adopted to determine the fitness of a person to study law for the purpose of becoming a member of the bar of the Supreme Court of Pennsylvania. There was no process denied this applicant, as he had a full and fair hearing before an impartial tribunal, and a judicial review appropriate to the nature of the proceedings. Neither the Supreme Court of Pennsylvania nor its boards are required to give a reason for refusal to register a student after he has had a full hearing before the board.

3. The applicant has assumed a reason for his rejection which is merely his own conjecture.

ARGUMENT

1. Due Process Clause Inapplicable.

In support of the first legal objection above stated, we wish to emphasize that the case before your Honorable Court is not one of disbarment, but of an application to register as a law student for admission to the bar of the State Supreme Court, through its duly constituted authority, the State Board of Law Examiners. Rejection from registration does not prevent a person from studying law—the applicant at present is a student at the Duquesne University Law School.

> "The power of a State to prescribe the qualifications for admission to the bar of its own courts is unaffected by the fourteenth amendment, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe:" *Bradwell v. The State*, 16 Wall. 130.

While this statement is from the syllabus, we think it is a correct conclusion from the opinion. The Bradwell case was followed by *In re Lockwood, Petitioner*, 154 U. S. 116, where it was held that citizenship did not give the right, under the Fourteenth Amendment, to admission to practice law.

In the more recent case of *Keeley v. Evans et al.*, 271 Fed. 520, where the Supreme Court of the State of Oregon rejected an applicant for admission, the United States Courts refused to interfere, holding that a Federal Court has no power to review "the action of the state Supreme Court in denying a license to practice law in the state." Your Honorable Court dismissed the appeal: 257 U. S. 667.

In 1938 your Honorable Court had occasion to review the action of the Circuit Court of Appeals of the Ninth

Circuit, in deciding that the right to practice law was not guaranteed by the Federal Constitution. The Circuit Court stated:

> "We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws:" *Mitchell v. Greenough et al.*, 100 F.(2d) 184, at page 185.

Your Honorable Court refused to allow a petition for a write of certiorari: 306 U. S. 659.

In England the power to admit attorneys was vested in the courts by statute 4 Henry IV, chap. 18. The practice in that country has long been to entrust complete control of admissions to the bar itself to the Inns of Court. The benchers alone may recommend admissions, and the courts will in no way interfere with their recommendations, except that the judges may intervene as visitors of the Inns of Court: *In re O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777.

In this country, the power to regulate the admission, discipline or disbarment of attorneys has always vested in common law courts such as those of Pennsylvania. *Ex parte Secombe*, 19 How. 9; *Olmsted's Case*, 292 Pa. 96. The history of the exercise of this power in Pennsylvania has been traced in part in the latter case.

The office or profession of attorneys, and the law relating thereto, are peculiarly different from all other offices, occupations or professions, especially because attorneys are both agents of their clients and officers of the court: *Ex parte Garland*, 4 Wall. 333, 378; *Case of Austin and others*, 5 Rawle (Pa.) 191, 203; *In re Samuel Davies*, 93 Pa. 116, 120.

By admitting an attorney to the bar, the court presents him to the public as worthy of its confidence in all his professional duties and relations: *In re Samuel Davies*, supra, at page 121; *Ex parte Garland*, supra, at page 378.

There is a fundamental distinction between admission to the bar and removal or discipline after admission. Once having entered upon the office of attorney, the practitioner has a vested property right which can be taken from him only upon notice and hearing in conformity with the due process clauses of the Federal and State Constitutions: *Montgomery County Bar Ass'n v. Rinalducci*, 329 Pa. 296, 299.

In *In re O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777, supra, there is a well reasoned opinion which holds that no property right exists in a person who applies for admission to the bar (in this case to study law or be registered as a student for that purpose) prior to his admission to the bar and that such a candidate has no right protected by the Fourteenth Amendment.

There are numerous decisions supporting the views herein expressed. In addition to the above citations we might refer to the language in *Ex parte Secombe*, 19 How. 9, supra, where Chief Justice Taney stated, at page 13:

> "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

See also *Bergeron, Petitioner*, 220 Mass. 472; *Matter of Ole Mosness*, 39 Wis. 509; Note in *10 L. R. A. (N. S.) 289; Cohen v. Wright*, 22 Cal. 293.

2. DUE PROCESS AFFORDED.

On the second legal objection, there is no averment or allegation that the rules and regulations relative to registration and admission to the bar, as set forth above and in Appendix "A", have not been complied with. On the contrary, as shown by the history of the case, there was full compliance. They were strictly followed and the applicant received all the protection afforded by the process which the State has adopted to determine the fitness of a person to become a member of the Supreme Court's bar. Compare *Local Government Board v. Arlidge* [1915] A. C. 120.

The applicant makes some complaint that he was not told the reason for his rejection. Under the rules as interpreted by the Supreme Court of Pennsylvania no reasons are required to be given. The several boards are required to make a full, complete and impartial investigation. Their sources of information are very frequently confidential. The information is investigated to ascertain the truth. To make any disclosure of such information or its sources would often lead to unfortunate results and would impede the action of the various boards in determining whether the applicant is fit to hold the office of attorney.

Even assuming that the due process clause were applicable to such proceeding, there was nothing in the procedure prescribed or herein followed which denies the applicant of the necessary process.

In every case involving the question of due process the subject matter must be considered, and proceedings involving the office of attorney are not to be treated as similar to other proceedings: *Ex parte Wall*, 107 U. S. 265.

The procedure followed in the State of Pennsylvania has been sanctioned by long usage, not only in this country but also in England. In such a case, of course, there has

been no deprivation of due process. *Murray's Lessee et al. v. Hoboken Land & Improvement Co.*, 18 How. 272.

Therefore, it is unnecessary for the court or any of the boards here involved to state its reasons for rejecting an applicant. The writing of an opinion is unnecessary for due process, and many tribunals make orders without stating their reasons or rendering an opinion. A recent illustration is found in *McGrath v. Nolan*, 83 F.(2d) 746 (C. C. A. 9th, 1936), where the court held that it was unnecessary to write an opinion on a decree dismissing a libel for failure to state a cause of action.

The applicant does not complain that he was denied notice or an opportunity to be heard, nor does he state any facts relating to the impartiality of the tribunal. All of the requirements of due process have therefore been fulfilled.

3. Record Insufficient to Establish That Applicant Was Rejected for the Reasons He Asserts.

There is no basis for the applicant's assumption that he was rejected solely for the reasons set forth in his petition. Under the procedure above described the entire character of the applicant was studied by the boards and the Supreme Court. It was on the basis of the entire record that he was rejected.

There is nothing in the applicant's petition to establish that he was deprived of his rights of speech or property.

Your Honorable Court is therefore respectfully requested to dismiss the petition for writ of certiorari.

Respectfully submitted:

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Robert T. McCracken